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| **SUPREME COURT, STATE OF COLORADO**<br><br>Ralph L. Carr Colorado Judicial Center<br>2 East 14th Avenue<br>Denver, CO 80203 | |
| Certiorari to the Court of Appeals, 14CA2494<br>District Court, Adams County, 13CV32771 | |
| ***Petitioners:***<br><br>N.M., a minor child, by and through his parent and legal guardian MARIA LOPEZ,<br><br>**v.**<br><br>***Respondent:***<br><br>ALEXANDER S. TRUJILLO. | |
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# ANSWER BRIEF OF RESPONDENT ALEXANDER S. TRUJILLO

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

**The brief complies with the applicable word limits set forth in C.A.R. 28(g)**

☒ The brief contains 9,041 words.

**The brief complies with the standards of review requirements set forth in the C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b)**

☒ In response to each issue raised, this brief contains, under a separate heading, before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and if not, why not.

**I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.**

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Respondent, Alexander S. Trujillo ("Trujillo"), by and through counsel of record, Zupkus & Angell, P.C., hereby submits Trujillo's Answer Brief.

## I. INTRODUCTION

Respondent Trujillo, who is both a home and a pet owner, respectfully requests this Court to uphold the majority ruling of the Court of Appeals affirming the trial court's dismissal of Petitioners' negligence claim. The Court of Appeals correctly and reasonably applied governing law in holding that Trujillo owed no duty to Petitioner/pedestrian N.M because Trujillo could not reasonably foresee that his dogs' barking, running toward their fence, putting their paws on their fence, and remaining in their own yard would cause N.M. to become so frightened that he would run across the sidewalk, between parked cars, into the street, and be struck by a passing car. *See Lopez v. Trujillo*, 2016 COA, at ¶¶ 19–20 (hereinafter *Trujillo*). Because no duty existed, the Court found that Petitioners could not maintain their negligence claim as a matter of law.

All parties, as well as the Court of Appeals, agree that the Colorado Supreme Court precedent of *Taco Bell, Inc. v. Lannon*, 744 P.2d 43 (Colo. 1987), governs resolution of this dispute. In *Taco Bell*, this Court established the process by which lower courts may determine the existence and scope of a duty of a negligence claim. *Taco Bell*, 744 P.2d at 46. Relying on *Taco Bell*, and supported by the reasoning of *Nava v. McMillan*, 123 Cal. App. 3d 262 (Cal. App. 2. Dist. 1981), the Court of

Appeals correctly held that Trujillo owed no duty to N.M. as a matter of law. *See Trujillo* at ¶¶ 8–31. The opinion below is in accord with *Taco Bell* and does not conflict with any other decision by the Court of Appeals or this Court.

The Court of Appeals also reasonably held that, under the facts, an imposition of liability on Trujillo under the circumstances would infringe on basic public policy issues regarding private property rights, thus, placing an impossibly high burden on dog ownership. For the reasons set forth herein, because Petitioner has failed to show that Respondent owed any actionable duty to N.M., this Court should affirm the Court of Appeals' judgment.

## II. STATEMENT OF ISSUE

This case is about the right of a landowner to keep pet dogs on his own property. The principal issue presented by this negligence action is whether Respondent owed a duty of care to N.M., a pedestrian on the sidewalk adjacent to his home, to take reasonable measures to protect N.M. against injury resulting from N.M. running into a busy street to avoid two dogs who had allegedly frightened him, when the two dogs remained confined to Respondent's fenced yard and never touched, bit, or otherwise made physical contact with N.M. The question presented, as framed by this Court, is whether the Court of Appeals erred by holding that a dog

owner does not owe a duty of care to a child pedestrian who, frightened by the owner's dogs, ran into the street and sustained injuries from a passing vehicle.

## III. FACTUAL AND PROCEDURAL BACKGROUND

### A. Factual Background

The facts in this case are straightforward. On August 5, 2013, N.M. was walking with his cousin, J.L., on a public sidewalk. (R. CF, p. 43 at ¶ 8). As they walked along the public sidewalk in front of Trujillo's home, N.M. alleges that two dogs barked and ran up to the fence in front of Trujillo's home. (R. CF, p. 43 at ¶ 12). N.M. alleges that, because he was startled by the dogs, he ran off the sidewalk and into the street, where he was struck and injured by a passing vehicle. (R. CF, p. 43, at ¶¶ 12–14). The dogs did not touch, bite, or make any physical contact with either pedestrian. (Am. Compl. at ¶¶ 12–13; Appellant's Opening Brief at 7 n.2; *Trujillo* at ¶ 19). At all times, the dogs remained within the confines of Trujillo's fenced yard. (Am. Compl. at ¶¶ 12–13; *Trujillo* at ¶ 19).

Trujillo respectfully requests that this Court disregard all new facts alleged for the first time in the Opening Brief. Arguments not advanced at the trial court level are generally deemed waived on appeal. *See Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 287 P.3d 842, 847 (Colo. 2012) (citation omitted). Issues

not raised in, or decided by, a lower court will not be addressed for the first time on appeal. *See People v. Salazar*, 964 P.2d 502, 507 (Colo. 1998).

Petitioners, for the first time in their Opening Brief, allege facts that were not contained in the First Amended Complaint. For the reasons stated herein, the Court should disregard the following allegations:

Petitioners allege, "Trujillo's dogs would habitually run to the fence, jump up onto and rattle it, and bark at the pedestrians." (Opening Brief, p. 4). However, the First Amended Complaint never alleges that the dogs would "habitually" perform these actions. The First Amended Complaint only states, "Upon information and belief, at the time of the incident . . . Trujillo had actual knowledge of previous incidents in which his two pit bulls frightened others by rushing the fence, barking loudly in a threatening manner, and jumping up on and rattling the fence. . . ." (R. CF, p. 44).

Petitioners quote, at length, from the deposition of former Defendant Jeff Daniels. (Opening Brief, pp. 4–6). However, Mr. Daniels' deposition was neither cited nor incorporated by reference in the First Amended Complaint. Petitioners cannot now add this new language to their argument. *See, e.g., Fluid Tech, Inv. v. CVJ Axles, Inc.*, 964 P.2d 614, 616 (Colo. App. 1998) (on appeal, the court must

consider only matters stated in the complaint and must not go beyond the confines of the pleading).

Petitioners also claim that the dogs were 2–3 feet tall. (Opening Brief, p. 32). This information was not alleged in the First Amended Complaint and should be disregarded. *See Fluid Tech*, 964 P.2d at 616.

Petitioners also claim that the dogs "habitual[ly] menac[ed] . . . pedestrians." (Opening Brief, p. 32). This statement, based on inferences improperly drawn from Mr. Daniels' testimony, was not alleged in the First Amended Complaint and should be disregarded. *See Fluid Tech*, 964 P.2d at 616.

Finally, Petitioners argue that "the District Court's inference that the dogs 'lunged,' at N.M. should be accepted as true." No known legal precedent provides that factual inferences made in a district court order must be taken as true. The word "lunged" was never used in the Amended Complaint. Accordingly, it should not be considered as part of this Court's *de novo* review. *Id*. *See Fluid Tech*, 964 P.2d at 616.

Petitioners had at least two opportunities to amend the Complaint at the district court level to allege facts supporting these claims. Petitioners cannot now add or omit relevant facts that were not available to, or considered by, the district court. Accordingly, the Court should not consider any of the above-referenced

newly alleged facts, because they were not presented to the district court in connection with the Motion to Dismiss.

### B. Procedural Background

Petitioners' summary of the procedural history of this case omits certain key facts. Petitioners originally filed four claims for relief against Trujillo, two of which Petitioners confessed after conferral on Trujillo's Motion to Dismiss: their negligence *per se* claim pursuant to Adams County Ordinance 6 (Pet Animal Licensing and Control), and their strict liability claim pursuant to Colorado's "Dog Bite" statute, C.R.S. § 13-21-124. (R. CF, p. 47). Plaintiffs refused to withdraw their claim pursuant to the Premises Liability Act or their negligence claim, thus precipitating Trujillo's filing of a Motion to Dismiss pursuant to Rule 12 of the Colorado Rules of Civil Procedure. The district court dismissed both claims. (R. CF, pp. 152–60).

The Court of Appeals unanimously affirmed the district court's dismissal of Petitioners' claim for relief under Colorado's Premises Liability Act, C.R.S. § 13-21-115 ("PLA"), holding that Respondent/homeowner Trujillo is not a "landowner" for the purpose of the PLA, as the sidewalk was public land, and because allowing liability for off-premises conduct would undermine the purpose of the PLA. (R. Court File, pp.159–60; and *Trujillo* ¶¶ 32–37).

A majority of the Court of Appeals found that the *Taco Bell* factors did not support a determination that Trujillo owed a legal duty to N.M as a matter of law, and thus, the Court of Appeals further affirmed the district court's dismissal of Petitioners' negligence claim against Trujillo. *Trujillo* ¶¶ 8–31. In relevant part, the First Amended Complaint alleged that homeowner Trujillo owed a duty to "exercise reasonable care to control his vicious/dangerous pit bulls so as not to frighten, threaten or harm others. . . ." (R. CF, p. 47 ¶ 37). The First Amended Complaint alleged that Trujillo breached this duty by *failing to prevent* his dogs from "threatening and frightening pedestrians walking in front of his house." *Id.* ¶ 38. Thus, the First Amended Complaint alleged, N.M. suffered bodily injuries and damages. *Id.* ¶ 39. Petitioners seek review of only of the Court of Appeals holding affirming dismissal of N.M.'s Sixth Claim for Relief (Negligence) against Trujillo.

## IV. SUMMARY OF ARGUMENT

The Court of Appeals' decision should be affirmed. The Court of Appeals carefully followed existing legal precedent in holding that, because Trujillo could not reasonably foresee that the dogs' barking or running toward his fence would cause N.M. to become so frightened that he would run across the sidewalk, between parked cars, into the street, and be struck by a passing car, Trujillo owed no duty to N.M.

The Court of Appeals also reasonably held that an imposition of liability on Trujillo under the circumstances would infringe on basic public policy issues regarding private property rights, thus placing an impossibly high burden on dog ownership.

This Court should uphold the Court of Appeals' decision to affirm the district court's grant of Respondent's C.R.C.P. 12(b)(5) Motion to Dismiss because, under *either* the "no set of facts" or the "plausibility" standard addressed herein, Petitioners are unable to allege sufficient facts to support the imposition of a legal duty on Respondent.

## V. ARGUMENT

The Court of Appeals correctly concluded that, as a matter of law, Trujillo owed no duty to Petitioners. Accordingly, this Court should find that a dog owner, whose dogs did not leave their own yard or make any physical contact, does *not* owe a duty of care to a child pedestrian who, frightened by the owner's dogs, ran into the street and sustained injuries from a passing vehicle.

### A. The allegations of the Amended Complaint fail to state a negligence claim upon which relief may be granted under both the "no set of facts" test and the *Warne* "plausibility" test.

#### 1. Standard of Review and Preservation of Issue

Respondent does not disagree with Petitioners' recitation of existing legal precedent identifying the applicable standard of review as *de novo*. However, Respondent cannot—at this point—agree that the "plausibility" standard articulated in *Warne*, *Twombly*, and *Iqbal* applies to this Court's review of the district court's dismissal of Plaintiffs-Petitioners' claims pursuant to C.R.C.P. 12(b)(5), because it is unclear whether the *Warne* decision is binding on this case. As Petitioners observe, "*Warne* had not been decided at the time of the proceedings below." (Opening Brief, at 28). Petitioners cite no authority conclusively stating that *Warne* applies retroactively.

For the reasons set forth below, under either standard, Petitioners' Amended Complaint cannot survive a 12(b)(5) motion to dismiss.

**2. Analysis**

Petitioners devote eight (8) pages of their Opening Brief to the argument that the *Twombly*/*Iqbal* "plausibility" standard was adopted by this Court in *Warne v. Hall*, 373 P.3d 588 (Colo. 2016), and that *Warne* "applies retroactively." (Opening Brief at 7, 26–32). *Warne* adopts the plausibility standard, a stricter pleading standard than the "no set of facts" test previously used by Colorado courts in deciding a 12(b)(5) motion to dismiss.

Applying the "no set of facts" standard, both the district court and Court of Appeals properly held that dismissal pursuant to C.R.C.P. 12(b)(5) was appropriate. However, even if this Court decides that *Warne* applies retroactively, the standard articulated in *Warne* favors granting of Trujillo's Motion to Dismiss.

*a. Dismissal was proper pursuant to C.R.C.P. 12(b)(5).*

When a trial court dismisses a complaint under C.R.C.P. 12(b)(5), for failure to state a claim upon which relief can be granted, the standard of review is *de novo*. *Mapes v. City Council of Walsenburg*, 151 P.3d 574, 576 (2006). Under this standard, an appellate court, like the trial court below, may consider *only those matters stated in the complaint* and must accept all allegations of material fact as true and view the allegations in the light most favorable to the plaintiff. *Alma v. Azco Const., Inc.*, 10 P.3d 1256, 1259 (Colo. 2000) (emphasis added). The "no set of facts" standard states that a complaint should not be dismissed for failure to state a claim unless it appeared beyond a doubt that a plaintiff could prove no set of facts in support of his claim that would entitle him or her to relief. *See, e.g.*, *Qwest Corp. v. Colo. Div. of Prop. Taxation*, 304 P.3d 217, 221 (Colo. 2013).

Petitioners' lack of favorable outcomes at both the trial and appellate levels does not mean that all inferences were *not* resolved in favor of Petitioners. According to *both* the district court and the Court of Appeals, it appeared beyond

doubt that Petitioners could prove no set of facts in support of a claim that would entitle Petitioners to relief. *See, e.g.*, *Qwest*, 304 P.3d at 221; *Sprott v. Roberts*, 390 P.2d 465, 467 (Colo. 1964) (noting that "[t]his expresses the recognized way to test the sufficiency of a claim, and it has been applied in a legion of cases in the lower federal courts"). Put another way, even resolving all inferences in favor of Petitioners, both courts found that *no set of facts* alleged by Petitioners could possibly support Petitioners' negligence claim. The independent agreement of two separate courts on this issue underscores the weakness of Petitioners' claim.

*b. Even if this Court finds that* Warne *may be applied retroactively, the facts of this case support dismissal.*

As an initial matter, it is unclear whether the *Warne* standard should apply retroactively to this matter. Because *Warne* was only recently decided (in June 2016), there is little significant Colorado precedent interpreting or applying this standard. Curiously, however, Petitioners argue—even though *Warne* was not decided until after the Court of Appeals' decision in this matter—this Court should now evaluate the 12(b)(5) dismissal pursuant to the new *Warne* "plausibility" standard. The only other Colorado court to address this issue has simply stated, "*Warne suggests* that the new standard applies retroactively. . . ." *Semler v. Hellerstein*, 2016 COA 143, ¶ 26 (emphasis added).

Even if the Court finds that the "plausibility" standard applies to its *de novo* review of the 12(b)(5) motion to dismiss in this case, that application nevertheless results in a finding for Respondent. The majority in *Warne* emphasized that the *Iqbal/Twombly* standard helps in "weeding out groundless complaints" and its effectiveness in reducing the cost of litigation, *Warne*, 373 P.3d at 594, thus recognizing "a growing need . . . to expedite the litigation process and avoid unnecessary expense, especially with respect to discovery." *Id*.

In focusing on this benefit to the "plausible on its face" standard in pleading, *Warne* reveals a subtly different meaning and purpose behind the well-pled complaint requirement: gatekeeping for the courts and furthering judicial economy:

> [W]e have at times found it problematic to accept factual allegations that appear too conclusory, and on at least one occasion have, without openly criticizing the "no set of facts" standard, simply found a complaint insufficient to state a claim, for the reason that it merely asserted a theory without alleging facts which, if proved, would satisfy the elements of the claim.

*Warne*, 373 P.3d at 594 (citations omitted).

Pursuant to *Warne*, a plaintiff looking to survive an early motion to dismiss under C.R.C.P. 12(b)(5) must file a complaint that contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Warne*, 373 P.3d at 589 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

*Warne*, therefore, imposes a heightened pleading standard requiring that allegations of unlawful conduct be plausible, rather than merely possible. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. With respect to the "plausibility" standard described in *Twombly*, the Court in *Iqbal* explained, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 677. The *Iqbal* Court observed that "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id*. at 678. The Court in *Twombly* acknowledged that a court must treat the complaint's factual allegations as true, "even if doubtful in fact." *Twombly*, 550 U.S. at 555. But, in *Iqbal*, the Court cautioned that courts need not accept as true "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678. Such recitals are regarded as legal conclusions not subject to the presumption of truth. The Court set out a procedure for separating legal conclusions from factual

allegations: "[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id*. at 679.

As with the more lenient "no set of facts" standard, Petitioners' claims also fail under the "plausibility" standard articulated by *Warne*. In attempting to provide a framework for their Amended Complaint, Petitioners made threadbare recitals of the elements of a cause of action, supported by mere conclusory statements. *See id*. Such recitals are regarded as legal conclusions and are not subject to the presumption of truth. *See id*.

Petitioners' most egregious conclusory allegation was that the two dogs in Trujillo's fenced yard were "vicious or dangerous"—a designation which amounts to a legal conclusion. *See, e.g.*, *Sandoval v. Birx*, 767 P.2d 759, 761 (Colo. App. 1988); *DuBois v. Myers*, 684 P.2d 940 (Colo. App. 1984); CJI–Civ.4th 13:1). Of course, such an allegation supports Petitioners' claim, since this would assist Petitioners in their attempt to show that Mr. Trujillo had prior knowledge of the dogs' alleged "vicious" propensities.

The Amended Complaint and Petitioners' appellate briefings are riddled with this conclusion, as if, by saying it enough, Petitioners can will it to be true. However, Petitioners fail to provide any factual allegations in support of this conclusion. Even if the dogs were, indeed, "vicious or dangerous," Petitioners must still present "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 677. There must simply be "more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id*. at 678. A bare allegation that the dogs had previously run up to the fence and barked at other pedestrians does not rise to the level of a "vicious or dangerous" designation. Because this recital is a legal conclusion, it is not subject to the presumption of truth. *See id*. The district court, the Court of Appeals, and, now, this Court, are therefore, entitled to view this allegation with skepticism. Not only is there no evidence to support Petitioners' claim that the dogs were "vicious," but there is also no evidence to support any claim that Mr. Trujillo "knew" that the two dogs were "vicious." Mr. Trujillo cannot be expected to know an unknowable non-fact—nor should the Court charge him with such knowledge.

Accordingly, even if this Court finds that *Warne* applies retroactively, it should find that the Court of Appeals was correct in holding that the "facts" as alleged in the Amended Complaint are insufficient to survive a 12(b)(5) motion to dismiss.

### B. The Court of Appeals correctly held that the *Taco Bell* factors support a determination that Trujillo owed no duty to N.M.

#### 1. Standard of Review and Preservation of Issue

Respondent agrees with Petitioners' statements concerning the standard of review. Respondent disagrees with Petitioners' statement that "No party argued, at any stage of the proceedings, the *Warne* standard" (Opening Brief at 14), to the extent that it implies Respondent erred by not arguing the *Warne* standard before now. This matter was decided by the Court of Appeals on April 7, 2016. *Warne* was decided by this Court in June, 2016. It would have been impossible for either side to argue for, or against, application of the *Warne* standard.

#### 2. Analysis

##### *a. Trujillo owed no duty to N.M. because the harm suffered by N.M. was not reasonably foreseeable.*

The Court of Appeals properly applied existing legal precedent pursuant to *Taco Bell* regarding the determination of whether a defendant owes a duty to a

plaintiff, and, based on the record, the Court found that Trujillo owed no duty to N.M. as a matter of law. *Trujillo* ¶¶ 8–31.

A negligence claim requires that four elements exist: (1) defendant owed plaintiff a duty; (2) defendant breached the duty; (3) the breach was the cause of plaintiff's injuries; and (4) damages. *Vigil v. Franklin*, 103 P.3d 322, 325 (Colo. 2004). Of these, duty is the threshold element. *Id.* "The court determines, as a matter of law, the *existence* and *scope* of the duty—that is, whether the plaintiff's interest that has been infringed by the conduct of the defendant is entitled to legal protection." *Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313, 317 (Colo. 1908).

A negligence claim must fail if based on circumstances for which the law imposes no duty of care upon the defendant for the benefit of the plaintiff. *See University of Denver v. Whitlock*, 744 P.2d 54, 56 (Colo. 1987). Therefore, if the Court of Appeals' finding of no duty is to be overturned, it must first be determined that Respondent owed a duty of care to take reasonable measures to protect N.M. against the injury that he sustained. *See id.*

"[T]he existence and scope of the duty [addresses] whether the plaintiff's legal interest that has been infringed by . . . the defendant is entitled to legal protection." *Taco Bell*, 744 P.2d at 46 (internal quotations omitted). In determining whether the law imposes a duty on a defendant, the court considers many factors, including (1)

the risk of injury; (2) the foreseeability and likelihood of injury; (3) the social utility of the defendant's conduct; (4) the burden and magnitude thereof of guarding against injury; and (5) the consequences of placing this burden on the defendant. *Id.*

In deciding that Trujillo owed no legal duty to Petitioners, the Court of Appeals applied each of these factors. *Trujillo* ¶¶ 7–10; *see also Taco Bell*, 744 P.2d at 46. As part of its analysis of the foreseeability factor, the Court of Appeals distinguished Petitioners' cited case, *Machado v. City of New York*, 365 N.Y.S.2d 974 (N.Y. Sup. Ct. 1975). Taking the allegations in the First Amended Complaint as true, the Court of Appeals found *Machado* to be distinguishable:

> [T]the allegations of the complaint do not support a determination of foreseeability and the likelihood of injury. '[F]oreseeability is based on common sense perceptions of the risks created by various conditions and circumstances.' . . . Here, N.M., scared by the pit bulls, 'darted from the sidewalk out into [the street]' and was struck by a service van. *While the injuries were tragic, their likelihood was not foreseeable*."

*Trujillo* ¶ 17 (internal citations omitted) (emphasis added).

In *Machado*, the plaintiff, startled by the dog, moved back, fell, and injured herself. The *Machado* court found that the "treacherous or uncertain" footing caused by the presence of snow on the ground "increase[d] the probability that injury will result . . . from the frightened actions" of a person intending to avoid the dog. *Trujillo* ¶ 19 (internal citations omitted). "Here, however, N.M. did not step back from the barking dogs but ran off the sidewalk and into the street. We conclude it

was not foreseeable to defendant that a passerby, startled by the dogs that were confined, would run out into the street into the path of moving vehicles." *Id.* The Court of Appeals distinguished a *reasonably* foreseeable harm (stepping back and stumbling) from a harm which was *not* reasonably foreseeable (running off the sidewalk into traffic, being struck by a vehicle on the other side of the street). The following chart, based on the allegations in the Amended Complaint, reflects the geography of the incident:

| **1. Fence** | **2. Sidewalk** | **3. Northbound Lane: Kimberly Street** | **4. Southbound Lane: Kimberly Street** |
|---|---|---|---|
| No bite, no touch, no escape by dogs; no injury. Am. Compl. ¶¶ 8, 12. | No injury. Am. Compl. ¶¶ 8, 12, 13. | No injury. Am. Compl. ¶¶ 8, 11. | Impact with vehicle driven by Mr. Daniels; injury. Am. Compl. ¶¶ 11, 13, 14. |

In this regard, *HealthONE*, cited by Petitioners, is also distinguishable. In *HealthONE,* a division of this Court considered the foreseeability and likelihood that injury would result from anesthesiologist Dr. Ogin's conduct. *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 889 (Colo. 2002). Dr. Ogin argued that the chain of events that led to the plaintiff's injury was not foreseeable because so many individual events occurred between the alleged negligent act and the plaintiff's injury. *See id.* The *HealthONE* court disagreed, stating that foreseeability "includes whatever is likely enough in the setting in modern life that a reasonably thoughtful

person would take account of it in guiding practical conduct." *Id*. (citing *Taco Bell,* 744 P.2d at 48).

*HealthOne* is distinguishable because, although the chain of events described in *HealthOne* is lengthy, each event in that chain was contained within the order and structure of typical hospital procedures. When determining foreseeability, the issue is not so much the *number* of discrete events that lead to a lack of foreseeability, but instead the *type* of events:

> [I]t was reasonably foreseeable to Ogin that a patient could be mistakenly injected with phenol rather than guanethidine. Ogin had used both guanethidine and phenol and was aware that the vials for both medications were exactly the same, except for the name printed on the label. Both medications were kept in identical clear glass vials, which were identical in size and shape, and each was sealed with identical green stoppers covered with a foil seal with labels that were identical in size, shape, color, size of print, and background. Ogin was also aware that other doctors used the same nerve block cart and that none of those doctors used phenol.

*HealthONE,* 50 P.3d at 889.

Here, the Court of Appeals considered the facts alleged in the Amended Complaint and correctly concluded that—unlike *HealthONE*—the ultimate injury (struck by a vehicle on the opposite side of the street) did not flow naturally from the alleged initial event (dogs barking and running at the fence).

Furthermore, Petitioners never alleged that the dogs had ever before jumped over the fence or chased anyone outside the boundaries of Trujillo's property. Nor

did Petitioners allege that the dogs had ever physically attacked pedestrians on the adjoining sidewalk, or chased anyone into the street. Petitioners ask this Court to conclude that the risk was foreseeable because the dogs were, allegedly, large pit bulls who ran up to the fence and barked. It is certainly possible that two dogs barking from behind a fence could frighten a pedestrian. However, the *foreseeable* risk stemming from that behavior might be that a frightened pedestrian might step back and immediately stumble and fall, e.g., *Machado*, 365 N.Y.S.2d at 976; *Walcott*, 964 P.2d at 613, *not* that the pedestrian would choose to run off the sidewalk, between parked cars, and then dart into the street and get hit by a car on the opposite side of the street.

Therefore, the Court of Appeals correctly determined, as a matter of law, that no interest of N.M.'s was infringed by the conduct of Trujillo such that N.M. was entitled to legal protection—because N.M.'s act of running into the street to avoid two fenced-in dogs was simply not reasonably foreseeable.

*b. The Court of Appeals properly analyzed foreseeability pursuant to its duty analysis, not as a component of proximate cause.*

A negligence claim requires two distinct and separate foreseeability analyses. First, foreseeability is an integral element of duty. *See Taco Bell*, 744 P.2d at 47–49); *see also* John W. Grund, J. Kent Miller & David S. Werber, 7 COLORADO

PERSONAL INJURY PRACTICE—TORTS AND INSURANCE § 10:5, at 143 (3d ed. 2012). Second, foreseeability is the touchstone of proximate cause. *See Ekberg v. Greene*, 588 P.2d 375, 376–77 (Colo. 1978). The former is a question of law for the court; the latter is a question of fact for the jury at trial. *See Build It & They Will Drink, Inc. v. Strauch*, 253 P.3d 302, 306 (Colo. 2011).

The concepts of duty and proximate cause are often interchangeable, and can be easily confused, when the analysis of both involves the common question of foreseeability. *See Walcott v. Total Petroleum, Inc.*, 964 P.2d 609 (Colo. 1988). The determination of whether a risk was reasonably foreseeable as a matter of law "depends in part on the common sense consideration of the risks created by various conditions and circumstances, . . . and in part on the policy consideration of *whether a defendant's responsibility should extend to the results in question*." *Walcott*, 964 P.2d at 612 (citing KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 41, 43 (5th ed. 1984) (emphasis added) (hereinafter Keeton). Petitioners contend that, to survive the Court's threshold duty analysis, they only need show that *some* harm was foreseeable by Trujillo, not that the specific harm alleged was foreseeable. However, that position is at odds with the *Walcott* decision.

Petitioner's analysis of the *Westin* case only serves to further confuse this issue. In *Westin*, a division of this Court analyzed the two different types of

foreseeability analyses contained in a negligence action. *Westin Operator, LLC v. Groh*, 347 P.3d 606, 614 n.5 (Colo. 2015). First, "[t]o determine whether a defendant owes a plaintiff a duty to act to avoid injury, [the Court] assess[es]: (1) the risk involved in the defendant's conduct; (2) the foreseeability and likelihood of injury weighed against the social utility of the defendant's conduct; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant." *Id.* at 613–14 (citing *HealthONE*, 50 P.3d at 888; *Smith v. City & Cnty. of Denver*, 726 P.2d 1125, 1127 (Colo. 1986)). Thus, a court first decides whether a duty exists, and determines whether a risk was foreseeable. *See, e.g.*, *HealthONE*, 50 P.3d at 888; *Smith*, 726 P.2d at 1127.

If the risk is determined to be foreseeable, the court's job is not finished, however. The above factors are not exhaustive; a court may consider "'any other relevant factors based on the competing individual and social interests implicated by the facts of the case.'" *HealthONE*, 50 P.3d at 888 (citation omitted). Because no single factor controls, "the question of whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards—whether reasonable persons would recognize a duty and agree that it exists." *Taco Bell*, 744 P.2d at 46 (citing Keeton § 53 at 359).

If a duty exists, and the court then determines the scope of that duty. *Metro. Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313, 317 (Colo. 1980) ("The court determines, as a matter of law, the existence and scope of the duty—that is, whether the plaintiff's interest that has been infringed by the conduct of the defendant is entitled to legal protection."). It is the jury's job to decide *whether* the duty was breached by the defendant's actions, based on the (foreseeable) risk of injury. *See Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC*, 2015 COA 85, ¶ 30 (cert. denied Feb. 8, 2016) ("[A] finding of negligence does not create liability on the part of a defendant unless that negligence is a proximate cause of the plaintiff's injury.") (citing *City of Aurora v. Loveless*, 639 P.2d 1061, 1063 (Colo. 1981)). Causation is a question of fact for the jury unless the facts are undisputed and reasonable minds could draw but one inference from them. *Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 985–96 (Colo. App. 2011). The test for causation in fact is "the 'but for' test—whether, but for the alleged negligence, the harm would not have occurred." *Id.* 985. "The requirement of 'but for' causation is satisfied if the negligent conduct in a natural and continued sequence, unbroken by any efficient intervening cause, produce[s] the result complained of, and without which the result would not have occurred." *Id.* (internal quotation marks omitted);

*see also Build It & They Will Drink*, 253 P.3d at 306 ("the existence of proximate cause is a question for the jury. . . .").

Petitioners cite no Colorado cases contrary to the Court of Appeals' opinion, instead repeatedly attempting to distort *Taco Bell*. Foreseeability, as it applies to legal duty, is separate and distinct from foreseeability as to causation, and Petitioners' Opening Brief merely confuses the two doctrines.

***c.*** *The Court of Appeals did not err in concluding that, based upon the overarching mandate to effect fairness under contemporary standards, that the other Taco Bell factors weigh in favor of not imposing a duty on Trujillo.*

In addition to the foreseeability of the harm suffered, the other factors to be considered in evaluating the existence and scope of a legal duty include (1) the risk of injury; (2) the social utility of the defendant's conduct; (3) the burden and magnitude thereof of guarding against injury; and (4) the consequences of placing this burden on the defendant. *Taco Bell*, 744 P.2d at 46. The Court of Appeals correctly held that these factors, taken together, weighed against finding a legal duty.

A court's conclusion that a duty does or does not exist is "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is [or is not] entitled to protection." *Whitlock*, 744 P.2d at 57 (citing Keeton § 53 at 358). No one factor is controlling, and the question of whether a duty should be

imposed in a particular case is "essentially one of *fairness under contemporary standards*. . . ." *Whitlock*, 744 P.2d at 57 (citing *Taco Bell*, 744 P.2d at 46).

The *Whitlock* court also observed that a negligent failure to act (nonfeasance), rather than a negligent affirmative action (malfeasance), is a critical factor that "strongly militates against" imposition of a duty. *Whitlock*, 744 P.2d at 57. In such cases, imposition of a duty "would simply not meet the test of fairness under contemporary standards." *Id*. at 58. Here, Respondent committed no affirmative act: the two dogs on his property were appropriately fenced in. (Am. Compl. ¶ 12). The dogs never left Respondent's property. *See id*. There is no evidence that the public sidewalk adjacent to Respondent's property was hazardous.

In nonfeasance cases, the existence of a duty has only been recognized in situations involving a limited group of special relationships between parties. *See id*. Such special relationships are predicated on "some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." *Id*. (citing Keeton § 56 at 374). Such special relationships that have been recognized by courts include: innkeeper/guest, possessor of land/invited entrant, and parent/child. *See Whitlock*, 744 P.2d at 58 (citations omitted); *see also Westin*, 347 P.3d at 616, 618 (finding a special innkeeper/guest relationship).

As previously established, a negligence claim must fail if based on circumstances for which the law imposes no duty of care upon the defendant. *See Whitlock*, 744 P.2d at 56. *Westin*, cited by Petitioners, addressed negligence causes of action where a special relationship existed between Plaintiff and Defendant. (Opening Brief at 15, 16, 17, 20, 21, 23, 24 (citing *Westin*, 347 P.3d at 616, 618 (innkeeper/guest))). No such analogous special relationship exists here.

The present case likely involves an allegation of negligent nonfeasance. Petitioners do not complain of any affirmative action taken by Respondent, but assert instead that Respondent owed a duty to assure that the two dogs in no way frightened child pedestrians. Petitioners suggest "[s]imply tethering his dogs or muzzling them or keeping them inside would be easy ways for a jury to conclude that Trujillo could have prevented" such fright. (Opening Brief, at 25). But, "frightening" is a significantly lower bar than "barking from behind a fence, scaring a child pedestrian on a public sidewalk into running between two parked cars and into a busy street, where the child is struck by a passing vehicle on the opposite side of the street." If "frightening" was the only criterion in a "non-bite" negligence action, then many domestic animals are potentially guilty of that crime—and woe betide any dog owner whose pet is not confined and muzzled at all times. "All dogs bark, and it is not negligence for a person to keep a dog that barks. . . ." *Seegmueller v. Pahner*, 19

Ohio C.D. 693, 695 (Ohio Cir. 1907); *see also Nava*, 176 Cal. Rptr. 473. Not everyone likes dogs. Some people are frightened of dogs. The fact that one is subjectively frightened of a dog, without more, does not make that dog's owner liable for negligence. To be clear: in this lawsuit, Petitioners are asking the Court to make Respondent responsible for failing to prevent his already confined dogs from frightening a pedestrian into running across the public sidewalk, between two parked cars, into the street, and is hit by a passing vehicle *on the opposite side of the street*.

Furthermore, it is by no means certain that "[s]imply tethering [the] dogs or muzzling them or keeping them inside" would have prevented the dogs from "frightening" N.M. (Opening Brief, at 25). Mere possession of the *authority* to tether, muzzle, or further confine the dogs is not sufficient to establish that Respondent had the *duty* to exert such control with respect to the dogs, who were already appropriately confined behind a fence. *See, e.g.*, *Whitlock*, 744 P.2d at 59. For such a duty to be recognized, it must be grounded in a special relationship between Respondent and N.M. *See id*. Petitioners have failed to allege any fact that points to any special relationship out of which such a duty could arise.

As to the risk involved, the Court of Appeals observed that the dogs were fenced inside defendant's yard by a four-foot-high fence. *Trujillo* ¶ 16. "While the dogs may have jumped up on and rattled the fence, the complaint does not allege

that either dog jumped over the fence or physically harmed or touched N.M." *Id*. The Court of Appeals therefore identified that the risk of injury was low.

Petitioners continue to stress the alleged fact that Respondent's home is located across the street from a school (Opening Brief at 22), arguing that the Court of Appeals failed to consider that fact in rendering its decision. This is untrue: the *Trujillo* opinion specifically addresses this in its recitation of the facts alleged in the Amended Complaint. *See Trujillo* ¶ 3. In fact, the *Trujillo* court was clear that all alleged facts must be weighed in the light most favorable to the Plaintiff. *See id*. ¶ 6. The problem, for Petitioner, is that—even viewed in the most favorable light possible—the alleged facts simply do not support the existence of a duty. The mere geographic location of Respondent's property, is insufficient to establish any kind of duty to take affirmative action to assure that pedestrians do not run into the street.

Next, the Court of Appeals weighed the foreseeability and likelihood of injury against the social utility of Respondent's conduct. After considering the parties' cited legal authority, the court found *Nava,* 176 Cal. Rptr. 473, most persuasive and applicable to the instant case, stating, "'It is an integral part of our whole system of private property that an owner or occupier of land has a privilege to use the land according to his own desires.'" *Trujillo* ¶ 21 (quoting *Nava,* 176 Cal. Rptr. at 476). "Keeping a pet dog is undoubtedly one of the most cherished forms in which the

constitutionally protected right to own personal property is exercised. To most people it is more than ownership of mere personal property." *Nava*, 176 Cal. Rptr. at 476–77 (cited with approval by *Trujillo* ¶ 21). For these reasons, the Court of Appeals correctly concluded that the social utility of Respondent's conduct outweighed the foreseeability and likelihood of injury.

The Court of Appeals also considered the magnitude of the burden on dog owners of guarding against an injury like this one, correctly concluding that the burden is high, "as are the costs of placing any additional burdens on dog owners." *Trujillo* ¶ 22. The consequences upon the community of imposing a burden as suggested by plaintiff would be unreasonable: the owner of a dog would in effect be required to keep a dog in a place where it could neither be seen nor heard by members of the public. Additional measures, such as fence modifications, place a significant financial burden on dog owners and do not alleviate the possibility that a passerby would be frightened by a suddenly barking dog. *See id.*

Policy issues also favor a finding for Respondent. Anything else would simply impose too high a burden on land- and dog-owners. There is no logical justification for placing a duty upon Respondent to protect N.M. from the well-known dangers of running into a busy street. A conclusion that public policy supports the imposition of such a burden on dog owners to protect against liability

for nonfeasance directly contravenes the constitutionally protected right to property ownership.

### C. The Court of Appeals did not err in concluding that CJI-Civ. 13.1 is not law and should not be used to impose a legal duty on Trujillo.

#### 1. Standard of Review and Preservation of the Issue

Respondent does not disagree with Petitioners' recitation of existing legal precedent identifying the applicable standard of review as *de novo.*

Respondent agrees that "pattern jury instructions are not law." *Trujillo* ¶¶ 23–24. However, Respondent disputes Petitioners' characterization of CJI-Civ. 4th 13:1 as "instructive." A jury instruction is simply a guideline given by the judge to the jury about the law they must apply to the facts they have found to be true. It is not a mechanism by which Petitioners may create or expand existing law. Jury instructions are intended as a model and must yield to prevailing law. *See Short v. Kinkade*, 685 P.2d 210, 211 (Colo. App. 1983) Petitioners would have this Court apply these jury instructions as "elements" to support an ultimate finding of liability against Respondent. However, jury instructions are not authoritative and are not binding on this Court. Therefore, they simply do not trump case law. *See Krueger v. Ary*, 205 P.3d 1150, 1154 (Colo. 2009).

For 13:1 to be given, a legal duty must already have been established. For the reasons stated above, legal precedent does not support the imposition of a duty on Mr. Trujillo. Because there is no legal duty, analyzing a hypothetical future jury instruction in the context of the facts of this case is not particularly helpful or "instructive."

**2. Argument**

Instruction 13:1 is not the proper authority to cite when alleging elements of a claim such as this. This instruction is used to provide a jury with the elements necessary to establish liability for injuries caused by a domestic animal with dangerous or vicious propensities. *See id*. Such instructions are given to the jury after the conclusion of evidence at trial. *See* C.R.C.P. 51.1(1); *Vista Resorts v. Goodyear Tire & Rubber Co.*, 117 P.3d 70, 70 (Colo. App. 2004).

The "prevailing law" cited in the notes to CJI-Civ. 4th 13:1 reflects Colorado legal precedent regarding injuries inflicted by dogs coming into *direct physical contact* with plaintiffs. *See id*. Petitioners' reliance on jury instructions, in place of established legal precedent, for any point of law is therefore misplaced.

Petitioners appear to make three arguments with respect to 13:1: first, that the definition of "vicious or dangerous" described therein should be extended to include the behavior of the dogs as alleged in the Amended Complaint; second, that 13:1

proves that "non-bite" cases are actionable; and, third, that a jury—not the judge—should decide the causation issue, because "13:1 leaves the question of causation to the jury." (Opening Brief, at 36). None of these arguments, comports with binding case precedent, and each will be addressed in turn.

First, the Amended Complaint alleges that the two dogs on Trujillo's property were "vicious or dangerous." (Am. Compl. at ¶ 18). This is a legal conclusion which the Court is not obliged to treat as true. *See Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011) ("we are not required to accept as true legal conclusions that are couched as factual allegations.") (*citing Western Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008)). (Even prior to the Court's holding in *Warne*, this portion of the *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), holding—cited in *Western Innovations*—had previously been adopted by other Colorado courts. *See Vickery v. Evelyn V. Trumble Living Trust*, 277 P.3d 864, 869 (Colo. App. 2011) ("[W]e are not required to accept as true legal conclusions couched as factual allegations, and a complaint properly may be dismissed if the substantive law does not support the claims asserted.").)

Presumably, Petitioners made this allegation to establish prior knowledge by Trujillo that the dogs were vicious, in order to prove what Petitioners view as the "elements" of a "no-bite" case pursuant to 31:1. (Opening Brief, at 36). However,

there is no support for the proposition that the alleged behavior here (barking, running up to the fence, putting paws on the fence) is sufficient to show prior knowledge of the dogs' "vicious or dangerous nature"—*in a no-bite case*.

Ironically, the common theme shared by the cases cited by Petitioners, in support of their "no-bite" theory and in asking the Court to broaden the scope of the "vicious and dangerous" definition, is that they all involve a bite or an at-large dog, or both. Another commonality is that, in every instance, the evidence of the offending dog's "vicious or dangerous" nature was presented to prove the dog owner's prior knowledge of the dog's "vicious" tendencies. This knowledge, in turn, was used to impose a duty on the dog owner. *See, e.g.*, *Roalstad v. City of Lafayette*, 2015 COA 146 (bite); *Barger v. Jimerson*, 276 P.2d 744 (Colo. 1954) (bite); *Wilson v. Marchiondo*, 124 P.3d 837 (Colo. App. 2005) (bite); *Vigil By & Through Vigil v. Payne*, 725 P.2d 1155, 1156 (Colo. App. 1986) (bite); *Farrior v. Payton*, 562 P.2d 787 (Haw. 1977) (at-large dog).

Second, Petitioners cite *Fishman v. Kotts*, 179 P.3d 232, 236 (Colo. App. 2007) for the proposition that "'[n]on-bite' dog cases are actionable." (Opening Brief, at 36). That is not an accurate description of the holding in *Fishman*.

In *Fishman*, a horseback rider was injured after an at-large dog "nipped and bit" the hooves of the rider's horse, causing the horse to rear up and fall on top of its

rider. *Id*. at 234. The plaintiff alleged strict liability, negligence per se, and negligence against the dog's owner. *Id*. The jury returned a verdict in favor of the dog owner. *Id.* On appeal, the *Fishman* court concluded, *inter alia*, that the trial court did not err in giving the jury instructions outlined in 13:1. *Id.* at 235.

The Court of Appeals found *Fishman* to be factually distinguishable, because (1) the dogs in *Fishman* were running loose; and (2) one dog in *Fishman* bit the horse ridden by the plaintiff, causing it to rear and injure its rider, whereas in this case, there was no physical contact and no escape by the dogs. *Trujillo* ¶ 24.

In some cases, dog owners have been found liable under a "non-bite" theory. However, as the Court of Appeals noted, these cases are all distinguishable—primarily because the dogs in question were either loose (not leashed or confined) or because the injury occurred while the plaintiff was on the property of the dog owner: "[t]he dissent cites a number of cases, but with the exception of *Machado*, distinguished above, every case involves circumstances that differ greatly from those in the case before us." *Trujillo* ¶ 25.

Finally, Petitioners argue that the Court of Appeals' decision creates a conflict with the panel's decision in *Fishman* because, according to Petitioners, the Court of Appeals' decision attempts to take causation "away from the jury." (Opening Brief, at 36–37). But, there is no real conflict—merely a further attempt by Petitioners to

twist the law. As discussed above, Petitioners are misinterpreting the two different foreseeability analyses employed in a negligence action (foreseeability as it relates to duty versus foreseeability as a "touchstone" of proximate cause). The Court of Appeals never stated that the question of causation should be taken away from the jury. The Court of Appeals properly held that foreseeability, as it relates to Trujillo's legal duty, is a question of law for the court to decide. *See Connes v. Molalla Trafnsp. Sys., Inc.*, 831 P.2d 1316, 1320 (Colo. 1992). The Court of Appeals distinguished *Fishman* because there was no discussion in *Fishman* of the determination of duty as a matter of law, or of the *Taco Bell* factors. *See id.*

In analyzing 13:1, the *Fishman* court reviewed the disputed jury instruction "de novo to determine whether the instructions as a whole accurately informed the jury of the governing law." *Id*. (citing *Garcia v. Wal-Mart Stores, Inc.*, 209 F.3d 1170, 1173 (10th Cir. 2000); *Woznicki v. Musick*, 119 P.3d 567, 573 (Colo. App. 2005). In reviewing the instruction, the *Fishman* court was merely assessing its applicability to the facts of the case to determine whether the trial court abused its discretion in instructing the jury on the liability of dog owners. *Fishman*, 179 P.3d at 235.

Furthermore, unlike the instant case, *Fishman* went to a jury, where—naturally—jury instructions were a component of the trial. *Id.* The *Fishman* court

only examined the jury instructions to determine whether the instructions as a whole accurately informed the jury of the governing law, *not* for the purpose of relying on them in making a determination of whether the *Fishman* defendants owed a legal duty to the plaintiff in that case. *Id.*

Petitioners cite the *Trujillo* dissent extensively. Interestingly, however, Petitioners fail to also note that the *Trujillo* majority devoted *over four pages* of its opinion to dissecting, and soundly rejecting, the dissent's positions regarding jury instructions and foreseeability:

> Nor do the authorities cited by the dissent lead to a different conclusion. To support its disagreement with the *Taco Bell* risk factors, the dissent begins with a citation to CJI-Civ. 4th 13:1 (2013). Because the determination of whether a party owes a duty is a question of law to be determined by the court, presumably *this instruction would not be given until that determination has been made*. Thus, the instruction itself does not direct a court to determine whether a duty exists.

*Trujillo* ¶ 26 (emphasis added).

Again, "[p]attern instructions are not law, not authoritative, and not binding on this Court." *Krueger*, 205 P.3d at 1154. They do not usurp case law. The prevailing law in this case is the foreseeability/duty analysis set forth in *Taco Bell*, which is separate and distinct from the causation analysis described in the jury instructions and in *Fishman*.

Assuming, *arguendo*, that this Court finds analyzing the facts of this case under 13:1 "instructive," 13:1 still requires a finding that the dog owner "was negligent" (i.e., a plaintiff would have to sufficiently allege duty, breach, causation, and damages), and the plaintiff would have to sufficiently plead the dog's vicious or dangerous tendencies. CJI-Civ. 4th 13:1. And, as previously established, a conclusory allegation is insufficient to survive a motion to dismiss. *See Denver Post Corp.*, 255 P.3d at 1088 (favorably citing *Western Innovations*, 187 P.3d at 1158 (itself relying on *Twombly*, 550 U.S. at 555–56)).

As detailed above, Trujillo owed no duty to N.M. and, therefore, the Court need not determine whether Petitioners have made sufficient allegations regarding the dogs' "vicious or dangerous" tendencies. Nonetheless, Petitioners did not meet the legal standard outlined in C.R.S. § 18-9-204.5 (Unlawful ownership of dangerous dog), or in the cases they have cited interpreting this statute. Mere running, barking, and putting paws on their own fence does not sufficiently allege "vicious or dangerous" tendencies. The dogs' alleged behavior is normal dog behavior, and simply characterizing that behavior as "vicious or dangerous" is not enough to survive a motion to dismiss. Therefore, this Court should affirm dismissal of Petitioner's negligence claim.

## VI. CONCLUSION

WHEREFORE, Respondent Alexander M. Trujillo respectfully requests that this Court affirm the Court of Appeals' ruling.

Respectfully submitted on this 12th day of January, 2017.

**ZUPKUS & ANGELL, P.C.**
***Original Signature on File at Zupkus & Angell, P.C.***

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## CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2017, I served the foregoing **ANSWER BRIEF OF RESPONDENT ALEXANDER S. TRUJILLO** via Colorado E-Filing, which will send notification of such filing to the following parties of record:

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